SUPREME COURT, U. S.

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JOHN F. DAVIS, C

No. 1218

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

RALPH MOODY HALL,

Appellant,

v.

ELMER C. BAUM,
Chairman of the State Democratic
Executive Committee of Texas,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

JURISDICTIONAL STATEMENT

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RALPH MOODY HALL,
Appellant,

v.

ELMER C. BAUM,
Chairman of the State Democratic
Executive Committee of Texas,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

JURISDICTIONAL STATEMENT

Appellant appeals from a judgment of the Supreme Court of Texas holding him ineligible to run for Governor of Texas on the basis of a provision of the Texas Constitution and rejecting his claim that such provision, as construed by the court, is repugnant to the United States Constitution.

OPINION BELOW

The opinion of the Supreme Court of Texas is not yet reported. Together with the concurring opinion of Mr. Justice Smith, it is printed in the Appendix to this Statement (pp. 1a-16a, *infra*).

JURISDICTION

Appellant filed in the Supreme Court of Texas a petition for a writ of mandamus to compel appellee, the chairman of the State Democratic Executive Committee, to accept and file appellant's application for a place on the party's primary election ballot as a candidate for the Democratic nomination for Governor. The court denied the petition and in so doing rejected appellant's contention that if so construed as to prohibit him from becoming Governor as a result of this year's election the Texas constitutional provision on which the court's decision was based was repugnant to the United States Constitution. The judgment of the Texas Supreme Court was entered on February 16, 1970 (p. 17a, *infra*). A notice of appeal to this Court was filed in that court on February 18, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). Cases that sustain the jurisdiction of this Court include *Adamson v. California*, 332 U.S. 46 (1947); *Railway Express Agency, Inc. v. Virginia*, 282 U.S. 440 (1931).

STATUTE INVOLVED

Article III, Section 18, of the Constitution of Texas provides:

> "No Senator or Representative shall, during the term for which he was elected, be eligible to (1) any civil office of profit under this State which shall have been created, or the emoluments of which may have been increased, during such term, or (2) any office or place, the appointment to which may be made, in whole or in part, by either branch of the Legislature; provided, however, the fact that the term of office of Senators and Representatives does not end precisely on the last day of December but extends a few days into January of the succeeding year shall be considered as de minimis, and the ineligibility herein created shall terminated on the last day in December of the last full calendar year of the term

for which he was elected. No member of either House shall vote for any other member for any office whatever, which may be filled by a vote of the Legislature, except in such cases as are in this Constitution provided, nor shall any member of the Legislature be interested, either directly or indirectly, in any contract with the State, or any county thereof, authorized by any law passed during the term for which he was elected."

QUESTIONS PRESENTED

The salary pertaining to the office of Governor of Texas was increased by the Texas Legislature in 1969. This was during the current terms of all 150 members of the Texas House of Representatives and all 31 members of the State Senate. All such terms will last at least through this year, during which there will be a gubernatorial election. All members of the House of Representatives, who are elected for two-year terms in even-numbered years, and those state senators, constituting approximately half the membership of the Senate, whose four-year terms expire at the end of this year, are eligible for election as Governor and to receive the increased salary of the office if elected. A provision of the Texas Constitution, Article III, Section 18, makes the 15 state senators whose terms extend past 1970—including appellant—ineligible for election as Governor.

The questions presented are

1. Whether the cited constitutional provision denies appellant and other mid-term senators the equal protection of the laws by disqualifying them from running for election as Governor while not disqualifying any of the other incumbent legislators, whose terms will lapse before the Governor elected in 1970 takes office.

2. Whether Article III, Section 18, of the Texas Constitution, without serving any compelling state interest, infringes the political freedom of the state senators subject to its proscription and the freedom of the voters of Texas

to elect whom they will to public office in violation of the First and Fourteenth Amendments.

STATEMENT

Appellant is a member of the Texas State Senate. Elected first in 1962, he was most lately elected in 1968 to a four-year term as senator from the 9th Senatorial District of the state.[1]

In 1969, during appellant's current term and the current terms of all other representatives and senators now sitting, the Governor of Texas called a special session of the Legislature during which he proposed a bill to increase the salaries of the Governor and other state officials. A bill that, *inter alia*, increased the Governor's salary from $40,000 to $55,000 a year was passed by the Legislature during that session and signed by the Governor and thereby enacted into law.

On February 2, 1970, within the time allowed by the pertinent provision of the Texas Election Code, appellant presented to appellee, who is the chairman of the State Democratic Executive Committee, an application for a place on the Democratic Party's primary election ballot as a candidate for the Democratic nomination for Governor. Appellee refused to receive and file the application. He acted on the advice of the Executive Committee's legal counsel that appellant was ineligible for the office of Governor. The sole basis of the advice was Article III, Section 18, of the Texas Constitution, which provides that "no Senator or Representative shall, during the term for which he was elected, be eligible to . . . any civil office of profit under this State . . . the emoluments of which may have been increased during such term. . . ."

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[1] All state senators were elected in 1966 after a reapportionment and drew lots for two- and four-year terms so as to re-establish the regime under which half the Senate membership stands for election every two years. Appellant drew a two-year term.

Appellant at once filed in the Texas Supreme Court a motion for leave to file a petition for a writ of mandamus to require the appellee to accept and file his application. Leave to file the petition was granted, and the case was heard by the Supreme Court as an original matter upon the petition (as supplemented) and answer. The facts are not in dispute. The court below said:

> "Senator Hall possesses all of the qualifications—age, citizenship; etc.—required by the Constitution of the Governor of the State. His application was in statutory form and he tendered the required filing fee. He does not seek the office for personal economic gain. In participating in the vote in the August-September, 1969, special legislative session to increase the salary of the Governor, he did not cast his vote for reasons of personal gain or profit, nor was he guilty of wrongful conduct, connivance or impropriety in connection with his vote." (p. 3a, *infra.*)

The court nevertheless denied appellant's petition, rejecting his contentions that as a matter of state law Article III, Section 18, did not bar his candidacy. Appellant also asserted in his petition and supplemental petition that Article III, Section 18, if construed to make him ineligible for the governorship, offended the United States Constitution. (Pet. p. 5; Supp. Pet.) The court expressly rejected the contention that, so construed, the Texas constitutional provision denied appellant the equal protection of the laws. It also necessarily rejected his claim that the provision interfered with his political freedom and the freedom of the voters of Texas to elect the candidates of their choice in violation of the First and Fourteenth Amendments. (See p. 11a, *infra* [concurring opinion of Smith, J.])

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

The exclusion of appellant from the ballot in the Texas gubernatorial primary is discriminatory. The discrimination furthers no compelling state interest—indeed is without rational justification. The state constitutional provision by which the discrimination is effected denies appellant the equal protection of the laws in violation of the Fourteenth Amendment.

Classifications contained in laws distributing the franchise are subject to "careful examination" by this Court, and the "deference usually given to the judgment of legislators" does not extend to such laws. *Kramer v. Union Free School Dist.*, 395 U.S. 621, 626, 627 (1969). The reason is that the franchise is "close to the core of our constitutional system," *Carrington v. Rash*, 380 U.S. 89, 96 (1965); and is "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). In *Kramer* the Court struck down a New York statute excluding certain persons from voting in school district elections on the ground that the exclusion did not further a "compelling state interest." 395 U.S. at 633. See also *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

This principle is fully applicable to state laws prescribing the qualifications of candidates for political office, if for no other reason than that the freedom to go before the voters necessarily is bound up with a voter's right to support the candidate of his choice. In *Williams v. Rhodes*, 393 U.S. 23 (1968), there was an equal-protection challenge to an Ohio law restricting the access of new political parties to the ballot. The Court invalidated the law when it found that Ohio had failed to show any "compelling interest" justifying the restrictions. The Court said:

> "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is

> heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." 393 U.S. at 31.

The Texas constitutional provision challenged in this case discriminates between two classes of potential candidates for Governor on a ground that clearly is not justified by any "compelling interest" of the state. One class consists of those members of the Texas Legislature who were members when the Governor's salary was increased but whose terms will expire before the next Governor takes office. Under a recent decision of the Supreme Court of Texas, these legislators would be eligible for election to the governorship. In *Spears v. Davis*, 398 S.W.2d 921 (Tex. 1966), the court held that two state senators who were members of the legislature when it raised the salary of the Attorney General were eligible, during that same legislative term, to be placed on the ballot for Attorney General. The four-year term of one of the senators would lapse before the new Attorney General would take office. The other senator had been elected only two years before, but the court held that reapportionment of the Senate, which would occur at the next election, would cause his term to lapse at the same time as his colleague's. The court explained its holding thus:

> "It is in no way detrimental to the public interest for a member of the Legislature to desire election to the office of Attorney General. In the past, many of the occupants of that office were persons of prior legislative service. Under the Constitution of the United States, the disqualification of members of Congress to hold federal offices was limited to those positions which were to be filled by executive appointment. The threat of improper motives entering into the creation or improvement of a public office to be filled by election must have been considered remote. It would appear that the principal purpose of Article 3, § 18 of the Texas Constitution is to remove, if possible, any improper personal motive of gain that might influence a Legislator to

> create or increase the emoluments of a public office with the intention of resigning his legislative post in order to take the office which he, as a Legislator, had helped to create or make more attractive from a financial standpoint. The purpose sought to be served by the provisions of Article 3, § 18 of the Constitution will in no way be frustrated or defeated by holding the relators eligible to hold the office of Attorney General for the term beginning January 1, 1967." 398 S.W.2d at 929.[2]

The other class also consists of members of the Texas Legislature who were members when the Governor's salary was increased. The only difference is that these members were elected for four-year terms only two years prior to the next election (at which reapportionment will not occur). Approximately half of the state's 31 state senators, including appellant, are in this class and are, by the decision below, ineligible to run for Governor this year.[3] The remaining senators, as well as all 150 members of the Texas House of Representatives, are in the first class and are eligible to run.

The decision below, read together with *Spears*, establishes a classification scheme that, we submit, is indefensible. In *Spears* the Texas Supreme Court pretty much dismissed the idea that there was any need to guard against

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[2]The relevant language of Art. III, § 18, of the Texas Constitution at the time of the *Spears* case was not materially different from the language now contained in that provision. The provision then read:

> "No Senator or Representative shall, during the term for which he may be elected, be eligible to any civil office of profit under this State, which shall have been created, or the emoluments of which may have been increased during such term . . ."

The section was amended to its present form (pp. 2-3, *supra*) in 1968.

[3]It is literally the luck of the draw and that alone that has cast appellant into the disfavored class. The entire Senate was subject to election in 1966 following a reapportionment, and appellant chanced to draw a two-year term, which compelled him to run again in 1968 for the four-year term he is now serving. (See n.1, *supra.*)

legislators' yielding to the temptation to attempt to enrich themselves by increasing the emoluments of offices that they could attain only by standing for election. It found no need to apply the drastic sanction of ineligibility to the vast majority of legislators who might run during their terms for an office whose emoluments had been increased during such terms. In appellant's case the court, without attempting any policy explanation, resurrected the sanction for which it had seen no need four years before and applied it in its full rigor—but only to one who is a member of a class representing less than one-tenth of those who might be thought subject to the temptation to act on the basis of improper personal motivations.

Without regard to the exceptional degree of constitutional protection to which the candidacy rights of appellants and the other members of his class are entitled, the distinction that the court below has drawn between two classes of legislators will not withstand analysis even under "the traditional test for a denial of equal protection: whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective." *Turner v. Fouche*, No. 23, O.T. 1969, decided Jan. 19, 1970, slip op. p. 15. In *Turner*, this Court unanimously invalidated Georgia's freeholder requirement for membership on a county board of education on the ground that it constituted "invidious discrimination" against non-freeholders. So here, the exclusion of a legislator in appellant's circumstance from the ballot for Governor lacks any rational purpose and constitutes "invidious discrimination" that is repugnant to the equal protection clause.

The answer given by the Supreme Court of Texas (pp. 6a-7a, *infra*) does not meet the point. Indeed, the court did not even try to justify the discrimination or suggest any state objective it serves.[4] It cited *McGowan v. Maryland*,

[4]Appellee may argue, as he did before the Supreme Court of Texas, that one in appellant's position has an advantage over legislators whose terms are about to expire in that he will retain his

366 U.S. 420, 426 (1961), for the propositions that there is no denial of equal protection unless it can be shown that there is no reasonable basis for a classification, and that there is a presumption that a classification is reasonable. So far as the interests typically asserted in equal protection cases are concerned, the propositions are unassailable. Although we believe that interests of a different and higher order are involved here, we are, as just indicated, prepared to contest the matter on traditional equal protection grounds. We submit that the presumption of the reasonableness of classification goes only so far and not far enough to save the bizarre scheme of classification that the court below has found in Article III, Section 18 of the Texas Constitution.

The court's only other response was that the Constitution of the United States contains the same discriminatory feature: If the salary of a cabinet office had been increased by Congress in 1968, all members of the House and approximately one-third of the members of the Senate at the time of the increase would be eligible for that office when the Nixon Administration took office in January 1969 but the remaining Senators would not be eligible.

This was not an adequate response. We have learned, to begin with, that federal analogies are by no means sure guides to decision when state institutions are challenged as discriminatory. *Reynolds* v. *Sims*, 377 U.S. 533, 573

Senate seat if he does not win the governorship, thus giving him a greater incentive to vote for the salary increase and then seek the office. But the voters can assess the candidate's motives, which in the present case the Supreme Court of Texas found to be "of the highest order" (p. 3a, *infra*). Appellee also argued below that disqualifying appellant and other mid-term senators has the salutary effect of furthering the stability that staggered terms bring to the upper house of the Legislature. But of course this is true only when there is a salary increase or creation of a new office, surely rare occurrences. Also, these two objectives could have been more effectively and cleanly achieved by simply prohibiting any incumbent from running for another office without first resigning his seat.

(1964) (Senate representation based on political units rather than population); *Gray v. Sanders*, 372 U.S. 368, 378 (1963) (votes by political units as in the electoral college). More than that, however, the Texas Supreme Court itself in the *Spears* case drew the critical distinction between Article III, Section 18, of the Texas Constitution and Article I, Section 6, clause 2, of the United States Constitution when it pointed out that under the latter "the disqualification of members of Congress to hold federal offices was limited to those positions which were to be filled by executive appointment." 398 S.W.2d at 929. The federal constitutional provision reads:

> "No Senator or Representative shall, during the Time for which he was elected, be *appointed* to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time . . ." [Emphasis added.]

Appointive officials do not, of course, face the electorate. Therefore, the voters have no occasion to judge whether a Congressman who has voted to create an office or increase its emoluments should for that reason be denied that office. The Texas constitutional provision, however, has been construed to apply to both appointive and elective positions, and of course the position appellant is seeking is elective. If appellant is allowed to run, the voters of Texas—first in the primary and then in the general election if appellant were to win the nomination—will have a clear opportunity to judge for themselves whether he should be denied the governorship because of his membership in the Senate at the time the Governor's salary was increased.[5] Instead, the

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[5]The voters will have a like opportunity to assess the incumbent Governor in this regard if he runs for reelection (as he apparently will do). The bill increasing the Governor's salary was voted at a special session of the Texas Legislature which was called by the incumbent Governor last August, and he signed the bill into law. That involvement in the salary increase does not disqualify the incumbent Governor from running for reelection, nor does the Texas Constitution pro-

Texas Constitution, as interpreted in this case, substitutes in place of the voters' judgment an artificial and irrebuttable presumption that appellant should be denied the office for that reason.[6] In fact, appellant would presumably be ineligible even if he had voted against the increase!

A classification so lacking in rational purpose should not be allowed to stand.

II.

Apart from equal protection considerations, the provision of the Texas Constitution here challenged infringes the political freedom of appellant and other Senators in his class and the freedom of Texas voters to elect the candidates of their choice to public office. It does so without serving any compelling state interest and therefore violates both the First and Fourteenth Amendments. Moreover, the decision below offends the settled constitutional rule that, where fundamental constitutional interests are involved, even a compelling justification will not justify infringement of those interests if a less restrictive means of furthering the state's purpose is available.

Where such interests are involved, the state bears the burden of showing any infringement to be "necessary, and

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hibit any incumbent Governor from enjoying an increase in salary that is enacted while he is in office. *Contra*, U.S. Const., art. II, § 1, cl. 7.

[6]The Supreme Court of Florida once surveyed state constitutional provisions of the general kind in issue here and reported that 16 of them covered elective as well as appointive offices. State v. Gray, 74 So.2d 114, 117 (Fla. 1954). That court and at least one other state court of last resort have recognized, as the court below did in Spears v. Davis, 398 S.W.2d 921 (Tex. 1966), that the dangers sought to be protected against are attenuated or nonexistent in the case of elective offices. Concluding also that powerful considerations relating to basic political rights weigh against making legislators ineligible for elective office, they have read their states' constitutional provisions narrowly in their application to elective offices. See State v. Gray, *supra*, and cases cited therein; State ex rel. Grigsby v. Ostroot, 75 S.D. 319, 64 N.W.2d 62 (1954); Shields v. Toronto, 16 Utah 2d 61, 395 P.2d 829 (1964).

not merely rationally related," to the legislative purpose. *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964). This rule has been most frequently applied to legislation affecting First Amendment interests. *E.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *NAACP v. Alabama*, 377 U.S. 288, 307 (1964); *Cantwell v. Connecticut*, 310 U.S. 296, 304-07 (1940). It has been applied to the freedom of association, *e.g., Bates v. Little Rock*, 361 U.S. 516, 525 (1960); the right to travel, *Aptheker v. Secretary of State*, 378 U.S. 500, 512-13 (1964); the interest in the privacy of the marital relationship, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the freedom to practice one's profession, *Schware v. Board of Examiners*, 353 U.S. 232 (1957); as well as interests specially protected by the equal protection clause of the Fourteenth Amendment, *McLaughlin v. Florida*, *supra* (racial equality).

As the decisions of this Court make clear, the right to vote and the right to participate in the political process also fall within the category of essential interests protected by this rule. At least as early as *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), the Court recognized the right to vote as "a fundamental political right, because preservative of all rights." In recent years the Court has repeatedly stressed the fundamental importance of the right to vote in decisions invalidating schemes of weighting or apportionment that dilute one's vote, *e.g., Gray v. Sanders*, 372 U.S. 368 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964), *Reynolds v. Sims*, 377 U.S. 533 (1964); burdens, such as taxation, on the right to vote, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); unreasonable limitations on the franchise, *Carrington v. Rash*, 380 U.S. 89 (1965), *Kramer v. Union Free School District*, 395 U.S. 621 (1969), *Ciprianо v. City of Houma*, 395 U.S. 701 (1969); and unreasonable limitations on the candidates for whom one may vote, *Williams v. Rhodes*, 393 U.S. 23 (1968).

These decisions reflect the fact that "no right is more precious in a free country than that of having a voice in

the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders, supra*, at 17.

The same is true of the right of a political candidate and his supporters to participate in the elective process. Freedom of association for political purposes is protected by First Amendment principles against unwarranted intrusions. *NAACP v. Button*, 371 U.S. 415 (1963); *Bates v. Little Rock, supra; NAACP v. Alabama, supra.* Last Term the Court held that this freedom includes the right of a political party's candidate to a place on the ballot. *Williams v. Rhodes, supra.* As the Court there pointed out, "[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes." 393 U.S. at 31, and the state restriction was struck down because no "compelling interest" justified it. Although cast primarily in equal protection terms, *Williams* has strong due process underpinnings. See in particular the concurring opinion of Mr. Justice Harlan, 393 U.S. at 41.[7]

The decision below in this case represents a complete departure from these settled principles. As construed by the Supreme Court of Texas, Article III, Section 18, of the Texas Constitution effectively disenfranchises Texans who wish to vote for appellant in the forthcoming primary election.

At the same time, the challenged provision of the Texas Constitution seriously restricts the rights of appellant and his supporters to political association. The case here is not distinguishable from *Williams v. Rhodes, supra*, where this Court reversed Ohio's refusal to afford a place on the ballot

[7]A number of the cases cited in this section of the Statement were decided on equal-protection grounds. They are nevertheless relevant to the point being urged because they establish the high significance of the political interests that are impaired by the Texas Supreme Court's construction of the state's constitution.

to a political party and its candidate.[8] Appellant obviously has standing to vindicate his and his supporters' interests in political activity; his right to seek elective office is a necessary counterpart to his supporters' right to vote for him.[9] This point was underscored in *Shields v. Toronto*, 16 Utah 2d 61, 395 P.2d 829 (1964), which involved a state constitutional provision very similar to that challenged here. The court declined to interpret the provision as disqualifying a gubernatorial candidate, stressing the related constitutional interests that would be infringed by such a holding:

> "On patriotic occasions we hear a great deal of oratory declaiming how precious is the right and how essential is the duty to vote for the candidate of one's choice. The emphasis is placed on the first clause – the right to vote; and the second clause – for the candidate of one's choice, is minimized or forgotten. Lost sight of is the fact that the two rights are correlative, and that to make the first meaningful, the second must also be assured. Furthermore, the natural corollary of the right to vote is the right to seek and to serve in public office. Reflection on the matter will reveal that these rights are of vital

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[8] While the actual party to the litigation in *Williams* was the political party rather than the candidate himself, this difference in form is of no consequence.

[9] Snowden v. Hughes, 321 U.S. 1 (1944), has no bearing here on this point. That case held that no federal constitutional claim was raised by allegations that a candidate for state office had been excluded from a ballot by the isolated and unauthorized action of a government functionary. While the Court stated that the right to state office is not one protected by the due process clause of the Fourteenth Amendment, the sole authority cited for this statement was a 1900 decision that the right to state office is not protected "property." Moreover, any authority that *Snowden* might have had on the issue presented here has been effectively vitiated by subsequent decisions of this Court recognizing constitutionally protected interests in voting and in being elected to and holding public office. E.G., Williams v. Rhodes, 393 U.S. 23 (1968); Anderson v. Martin, 375 U.S. 399 (1964); Powell v. McCormack, 395 U.S. 486 (1969).

importance both to individual citizens and to the public." 16 Utah 2d at ___, 395 P.2d at 832.

No compelling justification supports the serious infringements of protected liberties that Article III, Section 18, entails. This is demonstrated by the fact that this provision has no application to more than nine-tenths of the legislators who vote to increase the salary of the governor or other state official. *Spears v. Davis*, 398 S.W.2d 921 (Tex. 1966).

Even if some legislative purpose were served by removing appellant and his fellow hold-over senators from the temptation of seeking to enrich themselves (while leaving all other legislators subject to such temptation) that purpose could as well be achieved by means less drastic than the declaration of ineligibility for office that Texas has adopted here. It would be possible, for example, to require that, if elected, any senator within the proscription of Article III, Section 18, as the court below has construed it could receive only the Governor's salary as it was before the 1969 pay raise.

In these circumstances, it is clear that Texas was bound to adopt the less drastic means that were available. For one of the salutary rules of modern constitutional jurisprudence is that, when fundamental interests protected by the Constitution are at stake, "the breadth of legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

This rule has been applied in cases where the questions relating to the franchise and to political action have been involved. The Court has held that the problems of determining whether servicemen have acquired a State domicile for voting purposes did not justify a provision of the Texas Constitution preventing any serviceman who moved to Texas during his military duty from voting so long as he remained in the service. *Carrington v. Rash, supra*. The Court said that "Texas is free to take reasonable and adequate steps . . . to see that all applicants for the vote actually fulfill the

requirements of bona fide residence." 380 U.S. at 96. But the absolute bar of the Texas Constitution was too drastic a step. Similarly, in *Kramer v. Union Free School Dist., supra*, the Court invalidated a New York statute excluding specified persons from voting in school district elections. The Court said that even if New York might legitimately limit the vote to those "primarily interested in school affairs" it had not tailored the statute to accomplish that purpose alone but had denied the franchise to too large a class. See also *Williams v. Rhodes, supra* at 31. And in *Turner v. Fouche*, No. 23, O.T. 1969, decided January 19, 1970, the Court applied this rule in a case where a state excluded nonfreeholders from eligibility to serve on county boards of education. The Court said that "whatever objections Georgia seeks to obtain by its 'freeholder' requirement must be secured, in this instance at least, by means more finely tailored to achieve the desired goal." Slip op. p. 17.[10]

In *Carrington v. Rash*, to take as an example that case which also came here from Texas, the state attempted to deal with a legitimate problem, but the solution it adopted went far beyond what was necessary and in so doing intruded upon the privilege, which is "close to the core of our constitutional system" 380 U.S. at 96, of a citizen to vote. Here, as we have shown (and as the court below itself once recognized), it is extremely doubtful at best that the problem to which Article III, section 18, is directed is really a problem, insofar as eligibility for elected office is concerned. But even if some important state interest would be served by preventing a legislator from running for an office whose salary he has voted to increase, the far less drastic alternative of limiting that legislator's salary, if his candidacy should be approved by the voters, to the level that existed before the pay increase was voted is available

[10]The existence of a less drastic alternative also buttresses appellant's claim, treated in the preceding section of this Statement, that Art. III, § 18, of the Texas Constitution denies him the equal protection of the laws.

to the state.[11] Appellant expressly offered, through counsel, to forego the salary increase voted last year in the event he should win the gubernatorial election. But even this manifestation of good faith was unavailing, and appellant has been barred from going before the electorate.

Because no "compelling interest" justifies the restriction of appellant's (and his supporters') rights, and especially since a less restrictive alternative is available, the restriction should be invalidated.

CONCLUSION

The judgment of the Supreme Court of Texas in *Hall v. Baum*, No. B-1956, dated February 16, 1970, should be reversed and the case remanded with instructions to the court to enter an order requiring appellee to accept appellant's application and filing fee forthwith in order that his name may be included among those certified by appellee to be eligible to become candidates in the Democratic primary election in the State of Texas scheduled to occur on May 2, 1970.

Respectfully submitted,

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February 21, 1970

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[11] Article II, section 1, clause 7 of the United States Constitution prohibits any increase (or decrease) in the President's salary during his term of office. If the United States Congress were to enact such an increase, obviously the solution would be to delay the effective date of the increase, not to relieve the President of his office.

APPENDIX

OPINION

IN THE SUPREME COURT OF TEXAS

No. B-1956

RALPH MOODY HALL,
Relator,

v.

ELMER C. BAUM, Chairman of the State Democratic Executive Committee,
Respondent.

ORIGINAL MANDAMUS

Sec. 18, Art. III, Constitution of Texas, provides:

> "No Senator or Representative shall, during the term for which he was elected, be eligible to (1) any civil office of profit under this State which shall have been created, or the emoluments of which have been increased, during such term, or (2) any office or place, the appointment to which may be made, in whole or in part, by either branch of the Legislature: . . . ."

The question to be decided in this direct proceeding in this court is whether by virtue of the quoted constitutional provision State Senator Ralph Moody Hall is ineligible to the office of Governor for the two-year term beginning in January, 1971 and ending in January, 1973. We hold that he is.

Senator Hall was elected to a four-year term in the State Senate in November, 1968. For purposes of this decision, we will assume that his current Senate term will end on December 31, 1972. The salary of the office of Governor was $40,000 per annum, for each of the fiscal years ending August 31, 1968 and 1969. The salary of the office for

the fiscal years ending August 31, 1970 and 1971 was raised to $55,000 per annum at a special session of the Legislature held in August and September, 1969. The salary of the office of Governor was thus increased, during the term of office for which Senator Hall was elected, from the $80,000 paid during the preceding fiscal biennium to $110,000 for the current fiscal biennium. Once we concede that the office of Governor is a "civil office of profit under this State," as we must, *Willis v. Potts*, 377 S.W.2d 622 (Tex. Sup. 1964), and that the salary of the office of Governor has been increased substantially during Senator Hall's current term of office, which it has, it would appear that a mere reading of Sec. 18, Art. III of the Constitution should end our search for an answer to our question. But relator insists, for various reasons, that the constitutional provision may not be interpreted to mean what it so plainly says. A matter of such serious import requires that the suggested reasons be considered and examined somewhat in depth.

This proceeding had its origin in the presentation to respondent, Elmer C. Baum, Chairman of the State Democratic Executive Committee, of relator's application for a place on the Democratic Party's May 2d Primary ballot as a candidate for the Party's nomination for the office of Governor. Chairman Baum refused to receive and file the application solely because he was advised by the Committee's legal counsel that the applicant was ineligible for the office of Governor. In refusing to receive and file the application, Chairman Baum acted in strict accordance with his statutory duty. Art. 1.05, Vernon's Texas Election Code; *Spears v. Davis*, 398 S.W.2d 921, 922 (Tex. Sup. 1966). Promptly thereafter, relator sought and obtained permission to file in this court a petition for writ of mandamus, directed to Chairman Baum and requiring that he accept and file relator's application. He is entitled to have the writ issue only if he is eligible for the office of Governor.

All possible side issues should be eliminated at the outset. Senator Hall possesses all of the qualifications—age, citizenship, etc.—required by the Constitution of the Governor of the State. His application was in statutory form and he tendered the required filing fee. He does not seek the office for personal economic gain. In participating in the vote in the August-September, 1969, special legislative session to increase the salary of the Governor, he did not cast his vote for reasons of personal gain or profit, nor was he guilty of wrongful conduct, connivance or impropriety in connection with his vote. In sum, relator's motives in participating in the vote by which the salary of the office of Governor was raised were of the highest order and in the interest of sound government.

Relator's reasons for contending that he is not rendered ineligible for the office of Governor by Sec. 18, Art. III of the Constitution are: (1) the provision was not intended to apply to the office of Governor when it was included in the Constitution of 1876, and subsequent amendment of the Constitution does not make it apply; (2) the raise in the Governor's salary does not constitute an increase of the "emoluments" of the office; and (3) if held to render relator ineligible for the office, the provision is discriminatory and void as to him and others similarly situated because it denies to them equal protection of the laws as guaranteed by the Constitution of the United States. We will examine the contentions in the order in which they are listed. They will be examined with an awareness that constitutional and statutory provisions which restrict the right to hold public office "should be strictly construed against ineligibility." *Willis v. Potts*, 377 S.W.2d 622, 623 (Tex. Sup. 1964).

Relator argues that inasmuch as the office of Governor was created by Sec. 1, Art. IV of the Constitution of 1876,[1] and the annual salary of the office was fixed by Sec. 5, Art. IV at "four thousand dollars and no more,"

[1]The full text of the Constitution of 1876 may be found in 8 GAMMEL, LAWS OF TEXAS 781-834.

the Legislature was powerless to create the office or to increase its emoluments; ergo, the proscriptions of Sec. 18, Art. III could not have been intended to apply to the office of Governor. The argument is not without a measure of logic; but to accept it would so limit the meaning of the broad phrase, "*any*[2] civil office of profit," as practically to denude it of meaning. If the proscriptions were not intended to apply to the office of Governor, neither were they intended to apply to the offices of Lieutenant Governor, Comptroller of Public Accounts, Secretary of State, Attorney General, Chief Justice or Associate Justice of the Supreme Court or District Judge, since each of these offices was also created in and by the Constitution and the salary of each was fixed therein at a stipulated amount.

The history of Sec. 18, Art. III simply will not support an interpretation which would remove practically all important state offices from the proscriptions and thus limit the phrase, "*any* civil office of profit," to local offices and minor state offices which might be created thereafter. As pointed out in a footnote to our opinion in *Spears v. Davis*, 398 S.W.2d 921, 923 (1966), the relevant language of Sec. 18, Art. III, with only slight and immaterial variations, was in our earliest constitutions, the Republic's Constitution of 1836 and the State Constitution of 1845. It was carried forward into the four subsequent state constitutions of 1861, 1866, 1869 and 1876. In all of the constitutions, except that of 1876, the Congress or Legislature, as the case might be, was authorized immediately or after a brief interval to increase the salary of the office of Governor beyond any sum set in the constitution. The salary as set in the Constitution of 1876 could not be increased by the Legislature without first amending the Constitution; but it seems to us more reasonable to say that the proscriptions of Sec. 18, Art. III, were intended to be operative to protect against that not unlikely event than that they were

[2] Emphasis ours throughout unless otherwise indicated.

never intended to apply to any of the important state offices created in the Constitution. Amendment of the Constitution in 1954 to remove the ceilings on salaries of all of these officials and entrusting the fixing of such salaries, above certain minimum levels, to the discretion of the Legislature, served to bring all state offices within the active orbit of the proscriptions once again. And if there had been any doubt of that fact, the doubt was surely dispelled by adoption by the people in 1968 of an amendment to Section 18, Art. III, in which the relevant proscriptions of the section were once again made applicable to the office of Governor and the other constitutional offices.

We are even more strongly convinced that the increase in the salary of the office of Governor for the current fiscal biennium to $110,000 from $80,000 for the preceding biennium is such an increase of emoluments as is contemplated by Sec. 18, Art. III. The increase monthly was $1250, and the increase was to exist and continue for a period of twenty-four months. We cannot regard this increase as insubstantial or insignificant. To the contrary, we hold the increase to be substantial as a matter of law. With this holding, we need not, and do not, decide whether Senator Hall would be ineligible if the increase had been purely formal, insubstantial and insignificant.

But relator argues that we should judge the character of the increase as substantial or insubstantial by the percentage of it which he would receive if elected Governor. This, he says, is because we held in *Spears v. Davis*, supra, at 929, quoting from *Shields v. Toronto*, 395 P.2d 829, 833 (Utah Sup. 1964), that the purpose of Sec. 18, Art. III ". . . was to guard against dishonesty or improper connivance by or with legislators and to prevent them from being influenced by ulterior schemes to enrich themselves at the expense of the public treasury by creating or increasing the pay of a public office and then taking advantage of it . . ." Relator then contends that inasmuch as, if elected, he would benefit by the salary increase for only some seven and one-half

to eight months, and the amount involved is not such as to provoke him to dishonesty or to convict him of scheming to raise the salary for the purpose of enriching himself, the increase in salary should not be held to be an increase in emoluments of the office as contemplated by the Constitution. We disagree with this argument; and we hold that the character of the increase of emoluments of office within the meaning of Sec. 18, Art. III, as substantial or insubstantial, is determined by the amount of the increase to the office and not by the part of the increase which would be paid to the one seeking the office.

If either of relator's first two contentions were sustained, our decision in *Spears v. Davis*, supra, that the increase in salary of the office of Attorney General did not render Senators Spears and Calhoun ineligible for that office because they were not seeking election to the office of Attorney General during the terms for which they were elected to the State Senate, was an exercise in futility and an idle gesture. Under relator's theory, they would not have been ineligible even if their Senate terms had overlapped that of the Attorney General.

We are not persuaded by relator's equal protection argument. The argument is that under our holding here and our prior decisions, members of the House of Representatives, all of whom have two-year terms which expire in November of even years, and fifteen or sixteen of the thirty-one Senators whose terms expire in November of even years before a new term of the Governor begins in the following January of odd years, are eligible for the office of Governor for such term even if the emoluments of the office have been increased for the term, while only the fifteen or sixteen hold-over Senators are ineligible for the office of Governor. This, says relator, is rank discrimination, and a violation of constitutional equal protection.

Relator is not denied equal protection of the laws unless it can be shown that there is no reasonable basis for the classification made by the constitutional provision, and

there is a presumption that the classification is reasonable. *McGowan v. Maryland*, 366 U.S. 420, 426, 6 L.Ed.2d 393, 399 (1961). We are unwilling to hold that there is no reasonable basis for the classification.

If the Texas constitutional provision creates an unreasonable classification in the respect suggested by relator, so does the Constitution of the United States. The Twentieth Amendment to the Constitution of the United States provides that the two-year terms of the members of the House of Representatives, and the terms of those Senators whose six-year terms are expiring, shall end on January 3rd before a new Presidential term begins on January 20th. The second paragraph of Sec. 6, Art. I of the Constitution of the United States provides:

> "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; . . ."

If the salary of the Secretary of Defense had been increased by Congress during a 1968 Congressional session, Congressman Melvin R. Laird, now Secretary of Defense, and all other 1968 members of the House of Representatives, as well as all Senators whose terms were expiring on January 3, 1969, would have been eligible for appointment by the incoming President to the office of Secretary of Defense, but those Senators whose terms were not expiring in January, 1969 would not have been eligible for such appointment. With a similar classification in the Constitution of the United States, we do not believe the classification provided by Sec. 18, Art. III, Constitution of Texas, violative of the Equal Protection Clause of the Fourteenth Amendment.

In support of his various contentions, relator cities decisions of the Supreme Courts of Utah, Florida and South Dakota. See *Shields v. Toronto*, 16 Utah 2d 61, 395 P.2d

829 (1964); *State v. Gray*, 74 So.2d 114 (Fla. Sup. 1954); *Adams v. Mathews*, 156 So.2d 515 (Fla. Sup. 1963), and *State v. Ostroot*, 64 N.W.2d 62 (S.D. Sup. 1954). In the cited cases constitutional provisions similar to Sec. 18, Art. III, were interpreted in varying fact situations which we will notice briefly. It should be noted here, however, that the decisions of the courts of other states interpreting constitutional provisions similar to ours are, at best, only persuasive, and never stare decisis, of the meaning of our Constitution.

In *Shields v. Toronto*, the Utah court held that enactment of a general salary consolidation measure containing 5% across the board salary increase for all state officials, designated by the court as insubstantial, did not, under a similar constitutional provision, render incumbent legislators ineligible for election to the offices of Governor and Secretary of State. There was a strong dissent by the Chief Justice. We do not regard the decision as persuasive in this case because, as we have stated, we regard the increase of salary for the Governor's office as substantial.

The Florida cases present a strange anomaly. In 1947, the Supreme Court, in an unanimous decision in *State v. Gay*, 28 So.2d 901, held under a similar constitutional provision that a State Senator was ineligible during his senatorial term for election to the office of State Comptroller for which office the salary had been increased during the Senator's term. The court went even further and held that the Senator's eligibility could not be saved by a general statutory provision that the salary of any office to which a legislator might be elected or appointed, if increased during his legislative term, should be the same as it was at the beginning of the legislative term. There was a spate of opinions in *State v. Gray*, supra. The majority of the court concluded that an increase in the salary of the Governor from $12,000 to $15,000, made during a Senator's term of office, did not render the Senator ineligible during such term for election to the office of Governor. The conclu-

sion was rested on a holding that the increase was contained in a bill making appropriations for a two-year period, was purely temporary, was personal to the occupant of the office rather than attached to the office itself, and was not, therefore, an increase in the emoluments *of the office* of Governor. *State v. Gay* was distinguished on the ground that the increase in that case was by statute and of a permanent nature rather than by appropriation bill and thus of a temporary character. Three of the Justices disagreed with that reasoning. In the later case of *Adams v. Mathews*, supra, in a situation said by the court to be identical with that in *State v. Gray*, the court held a Senator not to be ineligible to seek the office of Governor. The court noted in its opinion that three of the Justices who were not on the court when *State v. Gray* was decided did not agree with that decision but regarded it as stare decisis. Two Justices dissented. It thus appears that of the seven Justices on the Supreme Court of Florida in 1963, five regarded the 1954 decision in *State v. Gray* as unsound. We share the view that the *State v. Gray* decision is unsound; therefore, we decline to hold that the $55,000 salary in the instant case does not, because of its temporary character, represent an increase in the emoluments of the office of Governor.

In *State v. Ostroot*, supra, the Supreme Court of South Dakota held that the constitutional proscriptions were not intended to apply to constitutional offices which were elective, and thus that a legislator was not ineligible during his term to seek the office of Governor for which the salary had been increased. The conclusion was rested principally on a holding that originally salaries of all elective constitutional officers were fixed in the constitution and the Legislature had no power to increase such salaries. We have already dealt with this type argument in the light of our own different constitutional history.

In *Miller v. Holm*, 14 N.W.2d 99 (Minn. Sup. 1944) and *Dickinson v. Holm*, 65 N.W.2d 654 (Minn. Sup. 1954), the Supreme Court of Minnesota enforced similar constitutional proscriptions as written.

Our analysis of the cited cases from other jurisdictions indicates a total lack of unanimity of thought as to the wisdom of nullifying the constitutional proscriptions with which we are dealing, as well as a lack of unanimity of reasons for their nullification. The basic reason for refusing to nullify them is that the power to do so is not conferred upon the judiciary by the Constitution. If Sec. 18, Art. III, has outlived its usefulness and there is no longer need for the proscriptions there provided, as some of the courts of other states have indicated, the Constitution itself prescribes the remedy through a constitutional amendment submitted to and adopted by the people.

The petition for writ of mandamus is denied. A motion for rehearing will not be entertained.

Robert W. Calvert
Chief Justice

Opinion Delivered: February 16, 1970

IN THE SUPREME COURT OF TEXAS

[Caption Omitted in Printing]

CONCURRING OPINION

There can be no question but that the salary of the Governor was increased during the term of office for which petitioner was elected. The salary of the office of Governor remains increased until changed by the Legislature. The power to increase or decrease the salary of the Governor has been by the Constitution solely and exclusively placed in the Legislature. There has been no effort to change the provisions of the Constitution in this regard.

Counsel for petitioner, in oral argument, stated that the voters were entitled to exercise their freedom of choice and to hold that the petitioner was barred by the Constitution from seeking the office of Governor would be tantamount to denying the voters the freedom of choice in the matter of nominating and finally electing a Governor of the State of Texas.

This writer agrees that the voters should have the right to choose between *eligible* candidates for the office of Governor. It must be recognized that the people in adopting Section 18, Article III of the Constitution of Texas, indicated in no uncertain terms that it was not their desire to choose a Senator occupying the status of the petitioner. This would be true even if the incumbent Governor were not a candidate for reelection. Legal counsel for the State Democratic Executive Committee, who was also a member of the Senate when the salary of the office of Governor was increased from $40,000.00 to $55,000.00 per annum, advised the Chairman of the Committee that the petitioner was ineligible for the office of Governor. The distinction between this case and the case of *Spears v. Davis*, 398 S.W.2d 921, 922 (Tex. Sup. 1966) will be drawn later in this opinion.

Even, if, for the sake of argument, Section 18 of Article III should as a matter of equity and fair play be amended or repealed, this Court would be usurping the power of the Legislature and the people if it amended or changed the Section by judicial fiat so as to satisfy the ambition of an ineligible candidate for Governor.

We have declined to follow the holding in *State v. Gray*, Fla., 74 So.2d 114 (1954). I adopt the result sought to be reached by Mr. Justice Mathews in a dissenting opinion. In the *Gray* case, Senator Johns, in the General Election in November, 1952, was elected a Member of the Senate for a term of four years ending in November, 1956. The Court said that the term of Senator Johns would "continue during that portion of the unexpired term of the late Dan T. McCarty from the first Tuesday after the first Monday in January, 1955 until November, 1956." Section 5 of Article III of the State Constitution of the State of Florida at that time is as follows:

> "No Senator or member of the House of Representatives shall during the time for which he was elected, be appointed, or elected to any civil office under the Constitution of this State that has been created, or the emoluments, whereof shall have been increased during such time."

Since we are holding the Court's opinion unsound, we should follow the reasoning of Mr. Justice Mathews. We should apply the Constitution and the laws enacted pursuant thereto as we find them and not to satisfy some wish or desire of the moment. The Constitution should not mean one thing when applied to one man and another thing when applied to another man. The importance or the number of those affected should have no consideration in applying the Constitution. It may at times appear that some provision of the Constitution has served its useful purpose or appears to be inequitable when applied to members of the Senate. If so, then the Constitution should be amended in the manner and by the method provided for

in the document itself. It should never be changed by legislative fiat, executive usurpation or judicial fiat. It would be a revolutionary and dangerous doctrine, indeed, for this Court to adopt the theory of the petitioner and pursue a policy of by-passing the requirements about submitting amendments by the Legislature to the vote of the people.

If we adopt the theory of the petitioner, the Constitution may be amended or revised in accordance with the will of this Court quickly and economically and thereby save the time and expense of a proposal by the Legislature and a vote by the people. However, such a procedure would nullify completely the requirements of the Constitution with reference to amendment or repeal, and substitute a government of men for our Constitutional system of government under and regulated by law.

In the case of *Thomas v. State* ex rel. Cobb Fla., 58 So.2d 173, 178, the rule as stated in State ex rel. *Murphy v. Barnes*, 24 Fla., 3 So. 433, was quoted:

> "'. . . when a constitution directs how a thing shall be done, that is in effect a prohibition to its being done in any other way.'"

The same principle of Constitutional law and construction applies in determining whether or not the petitioner is eligible to the office of Governor under the provisions of Sec. 18, Article III of the Constitution of Texas.

In State ex rel. *Childs v. Sutton*, 63 Minn. 147, 65 N.W. 262, 30 L.R.A. 630, 56 Am. St. Rep. 459, it was suggested that the period of disqualification which would result from a construction as contended for by the respondent would constitute an unreasonable hardship. The Court, in brushing aside the contention, said:

> "We need not express an opinion on this question. The wisdom of such a Constitutional provision must be left to the consideration of the legislature which is charged with the responsibility of initiating constitutional change. We therefore conclude that the Secretary of State rightly refused to receive peti-

> tioner's filing as a candidate for the nomination for governor in the primary to be held September 14, 1954."

It is clear from a review of the history of Section 18, Article III of our Constitution that the office of Governor, as well as the other Constitutional offices, were and are within the ambit of all Constitutional eligibility provisions up to and including the Constitution of 1876. This same Section 18 was readopted by Constitutional Amendment in 1968. The 1968 amendment made no change in the 1876 provision. *Cox v. Robinson*, 105 S.W. 1149 (Tex. Sup. Ct., 1912). In this case, the following rule is stated:

> "The readoption in a subsequent Constitution of a provision found in the Constitution that it supersedes is presumed to have been with a purpose not to change the law; and the use of the same language is presumed to have been with the same intent."

The meaning of Section 18, Article III is no different today than when first adopted. Its terms have continuously been plain and definite. There is no room for construction. As said in *Cox v. Robinson, supra:* ". . . the words of the instrument lie before the Court already molded to their use, and its province extends no further than the enforcement of the language as written."

In the 1968 amendment there is a clear and unambiguous statement of ineligibility just as it appears as Article I, Section 23 of the Constitution of The Republic. As noted by this Court in *Spears v. Davis, supra*, the provision in the Constitution of The Republic was modeled after the similar provision in the Federal Constitution, Article I, Section 6, Clause 2. However, the writers of the Constitution of The Republic declined to limit the provision to appointed offices. The committee draft originally presented to the Convention at Washington-on-the-Brazos, which applied only to appointed offices, was changed before final adoption to the denial of eligibility for *any* office. The members of the Convention, no doubt, were aware of the effect of

the language used. They knew that upon the adoption of the provision that the President and Vice-President were subject to the provision. It is equally clear that when the Amendment was adopted in 1968, the people knew that the office of Governor was within the scope of the eligibility provision.

Turn now to this Court's decision in *Spears v. Davis* (Tex. Sup. 1966), 398 S.W.2d 921. In that case, we pointed out the distinction between a "term of office" and an individual's incumbency in office. It was contended that Senator Spears' term of office commenced with the convening of the 58th Legislature on January 8, 1963 and hence the term of State Senator overlaps that of the Attorney General for a period of approximately eight days.

As to Senator Calhoun, the second Senator involved in that case, it was suggested that even though Senator Spears should be declared an eligible candidate for the office of Attorney General, it did not necessarily follow that Senator Calhoun was eligible. It was pointed out that while Senator Spears was elected in November of 1962, Senator Calhoun was elected in November, 1964. This would extend the term of office of Senator Calhoun almost two years beyond January 1, 1967; the beginning date of the term of office of the Attorney General to be chosen at the 1966 general election. We held that both Senators were eligible candidates for Attorney General on the theory that their terms of office ended before January 1, 1967.

A careful reading of that case should lead anyone to conclude that neither the facts nor the legal issues of that case are involved here. It is true, we cite the case of *Shields v. Toronto*, 16 Utah 2d 61, 395 P.2d 829 (1964) in support of our holding that our interpretation of the constitutional provisions was in accordance with and not contrary to the purpose sought to be served by Article 3, # 18 of the Texas Constitution. We did not have in the *Spears v. Davis case* the question we have here. One Justice dissented to our holding as to both Senators. Chief Justice

Calvert dissented as to our holding in the Senator Calhoun case only. The Chief Justice agreed with our views in the *Spears* case but disagreed with the Court's holding that *Calhoun's* term as Senator did not overlap the term of the Attorney General which began on January 1, 1967. Our opinion does set out the doctrine of *Shields v. Toronto, supra,* but only in the context of the determination of the question of a few days overlap in terms of office in Senator Spears' case and the *shortened* term of Senator Calhoun as the result of reapportionment.

Our opinion in *Spears v. Davis* speaks for itself. The Court in *Shields v. Toronto* justified its holding when it said:

> "The absence of any improper machinations being practiced here is rendered even plainer by the fact that all that has been done has had full exposure to public view, and that these candidates have had full exposure to the elective process. Months before this suit was filed they had announced their candidates for office. They had to run before and obtain the approval of the conventions of their respective parties. They were obliged to run in the public primaries against formidable opponents; and must face candidates of the opposing party in the general election."

Apparently the petitioner seeks to justify his attempt to junk the Constitution by judicial fiat on the ground that his situation is similar to that of the candidates involved in *Shields v. Toronto.* The fact that petitioner is willing, as stated in his brief, to "participate in a Democratic Primary against a formidable opponent" would not warrant this Court in permitting him to do so in violation of the unambiguous terms of the Constitution.

The Court has properly denied the petition for writ of mandamus.

Clyde E. Smith
Associate Justice

Opinion Delivered: February 16, 1970

JUDGMENT

SUPREME COURT OF TEXAS

[Caption Omitted in Printing]

February 16, 1970.

This cause came on to be heard on petition for writ of mandamus, filed herein on February 2, 1970, and said petition, together with the record and briefs and arguments of Counsel having been duly considered, because it is the opinion of the Court that respondent, Elmer C. Baum, Chairman of the State Democratic Executive Committee, did not abuse his discretion by refusing to receive and file the application of Relator, Ralph Moody Hall, for a place on the Democratic Party's May 2nd Primary ballot as a candidate for the Party's nomination for the office of Governor of Texas, it is, therefore, *adjudged, ordered* and *decreed* that the writ of mandamus prayed for be, and hereby is, denied; in accordance with the opinion of this Court herein this day delivered.

It is further ordered that relator, Ralph Moody Hall; pay all costs incurred and expended in this Court.

It is further ordered that no motion for rehearing will be entertained in the above numbered and entitled cause.

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No. 1218

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

RALPH MOODY HALL,

Appellant,

v.

ELMER C. BAUM,
Chairman of the State Democratic
Executive Committee of Texas,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

MOTION UNDER RULE 43(4) FOR EXPEDITIOUS TREATMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

RALPH MOODY HALL,

Appellant,

v.

ELMER C. BAUM,
Chairman of the State Democratic
Executive Committee of Texas,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

MOTION UNDER RULE 43(4) FOR EXPEDITIOUS TREATMENT

The federal constitutional right appellant claims in this case will be seriously impaired and may be irretrievably lost unless this Court acts more promptly than is necessary in most cases.

Appellant's objective in this litigation is to have his name on the ballot in the Democratic gubernatorial primary election in Texas. The primary is to be held on May 2, 1970. The State Democratic Executive Committee will meet on March 9 to certify the eligible candidates and to take other action as well. The results will then be forwarded to the chairmen of the 254 county executive committees. Each

county committee will meet on March 16 to determine the order of placement of names on the ballot. The primary committee of each county executive committee will meet on March 23 to approve the primary ballot. Ballots may be printed during the week of March 16-23 and will certainly be printed within a few days after March 23. Absentee voting occurs during April.

We therefore request that appellee be directed to respond to appellant's Jurisdictional Statement no later than February 26, 1970. By letter dated February 18 and hand delivered on that day, counsel for appellee was notified of appellant's intention to appeal to this Court and to file in this Court a motion asking for expedited treatment. Additionally, appellee offered to cooperate and did cooperate in expediting a ruling by the Supreme Court of Texas in order to determine the merits prior to March 9.

Appellant is willing to waive further briefs and argument and submit upon the Jurisdictional Statement and any response appellee may file or to meet any time schedule for further briefing or argument or both that suits the Court's convenience.

Application has been made this day to Mr. Justice Black as Circuit Justice for the Fifth Circuit for temporary relief to prevent appellee from certifying a list of eligible candidates that does not include appellant's name, pending disposition of this litigation. An application asking such relief was denied and dismissed by the Texas Supreme Court on February 18.

Respectfully submitted,

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Of Counsel:
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February 21, 1970

SUPREME COURT OF THE UNITED STATES

October Term, 1969

HALL *v.* BAUM

APPEAL FROM THE SUPREME COURT OF TEXAS

No. 1218. Decided February 27, 1970

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.